Supreme Court, U.S.
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NO. 91-1491

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

HAROLD W. CLARKE, DIRECTOR,
NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioner,

vs.

CAREY DEAN MOORE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, subject to the following amplification.

The statement on page 4 of the Petition that "The [sentencing panel] found no statutory mitigating circumstances to exist and no additional evidence offered in mitigation which would, on balance, render a sentence of death inappropriate in either case" is misleading to the extent that it implies the existence of no mitigating circumstances. While the sentencing panel did not find the existence of any statutory mitigating factors, it specifically held: "The sentencing panel finds that the family background and upbringing of the defendant are entitled to consideration as a mitigating factor in the determination of punishment to be imposed in this case, but the panel further concludes that this mitigating factor is not of sufficient weight to outweigh the aggravating circumstances which have been found to exist beyond a reasonable doubt in this case." Petition, at 93a. As indicated by the sentencing panel's discussion, Nebraska is a "weighing state." Neb. Rev. Stat. §29-2522 (Reissue 1989). See Stringer v. Black, 60 U.S.L.W. 4214 (March 10, 1992).

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The issue is whether the lower courts correctly held unconstitutional Nebraska's facially vague aggravating circumstance, "the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," under the Eighth Amendment. Without contest, the language is facially vague. The United States Court of Appeals found further that the Nebraska Supreme

Court had failed to narrow it by construction to channel the sentencers' discretion "so as to minimize the risk of wholly arbitrary and capricious action" as required under Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980); and Maynard v. Cartwright, 486 U.S. 356 (1988).

Petitioner seems now to recast this familiar issue into two new claims or propositions not ruled upon below: (1) the facially vague aggravating factor may be excused even without a meaningful "channelling" construction in a judicial-sentencing state such as Nebraska; and (2) aggravating factors and their construction by state courts should be judged constitutionally acceptable despite their containing some degree of subjectivity. Those issues are fictional "straw men," and both derive from a misleading characterization of the grounds actually relied on below. The first would distort two decades of death penalty jurisprudence. The second may well be true in some cases, but is utterly beside the point in this case. The two arguments are efforts to pull the focus away from the routine, settled analysis upon which the case was correctly decided by both the courts below.

From this case's inception, the fundamental issue has been the Nebraska Supreme Court's construction of the admittedly facially vague aggravating circumstance found at Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989), which provides "the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

In its several efforts to breathe content into the generalized pejoratives announced in the statute, the Nebraska Supreme Court has interpreted § 29-2523(1)(d) to state two disjunctive standards which, alone or together, can operate to aggravate a first degree

murder conviction to death eligibility. In the direct appeal from Respondent's conviction and sentence, the Nebraska Supreme Court said:

> Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily tortuous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977). In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In State v. Stewart, supra, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing panel found the second circumstance did apply.

State v. Moore, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982). See Petition at 51a-52a.

The sole, narrow issue involved in this case is whether the gloss placed on the "manifested exceptional depravity by ordinary standards of morality and intelligence" aggravating circumstance by the Nebraska Supreme Court as of the time Respondent was sentenced provided sufficient definitional content to allow that circumstance to aggravate his sentence, consistent with the Eighth Amendment. The United States District Court for the District of Nebraska has consistently upheld the constitutionality of the first "prong" of this aggravating circumstance, as limited by construction, and has also consistently held unconstitutionally vague the second "prong." Moore v. Clarke, 904 F.2d 1226, 1229, n.5 (8th Cir. 1990). See also, Harper v. Grammer, 895 F.2d 473, 478 (8th Cir. 1990) **aff'ing**. 654 F.Supp. 515 (D. Neb. 1987); Holtan v. Black, 838 F.2d 984

(8th Cir. 1988). The decision of the Court of Appeals in this case correctly affirms the longstanding analysis of the District Court. The writ should be denied.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH PROFFITT V. FLORIDA, WALTON V. ARIZONA, OR LEWIS V. JEFFERS

Respondent's claim that the Court of Appeals' decision conflicts with Proffitt v. Florida, 428 U.S. 242 (1976) is plainly wrong.

In Proffitt, this Court approved generally the then-new Florida capital sentencing statutes. The three-Justice plurality opinion announcing the judgment of the Court rejected the argument that the Florida aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" was unconstitutionally vague, based on the Florida Supreme Court's construction which limited application of that aggravator to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 428 U.S. at 255-56.

That "torture" construction had first been announced in State v. Dixon, 283 So.2d 1 (1973). See Proffitt, 428 U.S. at 255. The Nebraska Supreme Court adopted the Dixon construction, approved in Proffitt, as to the first "prong" of § 29-2523(1)(d) in its initial review of Nebraska's post-Furman death penalty statutes. See State v. Stewart, 197 Neb. 497, 522-23, 250 N.W.2d 849, 862 (1977); State v. Rust, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977). But both the original sentencing panel and the Nebraska Supreme Court unequivocally found that "prong" not applicable in Respondent's case. State v. Moore, 210 Neb. at 470-71, 316 N.W.2d at 41; Petition at 51a-52a. The Petitioner has conveniently omitted that holding from the lengthy quotation contained on page 7 of the Petition.

Thus, the limiting construction approved by this Court in Proffitt was determined by both the sentencing panel and the Nebraska Supreme Court not to apply in Respondent's case. For that reason, Proffitt is inapposite, and nothing in the Court of Appeals' opinion contravenes Proffitt.

Similarly, the decision of the Court of Appeals is wholly consistent with both Walton and Jeffers.

The original panel opinion was filed on May 25, 1990. Petition at 1a. While petitioner's petition for rehearing and suggestion for rehearing en banc was pending, this Court decided Walton v. Arizona, __ U.S. __, 110 S.Ct. 3047 (1990) and Lewis v. Jeffers, __ U.S. ___, 110 S.Ct. 3092 (1990). Petition at 101a. The parties were directed by the Court to brief the impact of Walton and Jeffers, on the panel's decision. Petition at 101a. The opinion denying rehearing by the panel specifically notes, "As we are satisfied that our earlier opinion is consistent with Walton and Jeffers, we deny the Warden's petition for rehearing." Petition at 101a.

The opinion denying rehearing by the panel continues:

> We first observe that Jeffers reasserts the requirement that a state "'channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."'" Jeffers, 110 S.Ct. at 3099 (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)). Walton defines our procedure in such cases as follows:
>
> > When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined

> the vague terms and if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide some guidance to the sentencer. In this case, there is no serious argument that Arizona's "especially heinous, cruel or depraved" aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements.

110 S.Ct. at 3057 (emphasis in original).

> Our original opinion followed precisely this formula, examining first the question of whether the Nebraska statute's language was too vague to provide guidance to the sentencer, and then determining whether the Nebraska courts had narrowed the statutory language by construction.

Petition at 101a-102a. That analysis is correct, and counsels in favor of denying the writ.

III. THE FACT THAT RESPONDENT'S DEATH SENTENCE WAS IMPOSED BY A PANEL OF JUDGES RATHER THAN A JURY IS NOT RELEVANT TO THE ISSUE INVOLVED IN THIS CASE

Petitioner takes the remarkable position that "the logic of Maynard and Godfrey has no place in the context of sentencing by a trial judge." Petition at 10. Nothing in this Court's capital sentencing jurisprudence so holds.

Walton, in regard to this question, stands only for the proposition that judges acting as capital sentencers "are presumed to know the law and apply it in making their decisions." 110 S.Ct. at 3057. "If the Arizona Supreme Court has narrowed the definition of the 'especially heinous, cruel or depraved' aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition." Id. (Emphasis added.)

Here, the Walton presumption is irrelevant because the sentencing panel, in fact, expressly applied the construction of the aggravator previously adopted by the Nebraska Supreme Court. See Petition at 78a-79a; compare Moore v. State, 210 Neb. at 470, 316 N.W.2d at 41, Petition at 51a-52a. Where the sentencing judges, in fact, apply the extant appellate gloss, the Walton presumption adds nothing to the analysis.

Rather, the question raised by this case and decided by the Court of Appeals is whether the construction placed on the second "prong" of the aggravating circumstance by the Nebraska Supreme Court in fact limited or narrowed the unconstitutionally vague language set out in the statute. The Court of Appeals held that it did not: "In conclusion, we believe that the body of law developed by the Nebraska Supreme Court construing the challenged statute provides insufficient guidance to a sentencing body called upon to determine whether a particular murder 'manifested exceptional depravity.'" 904 F.2d at 1233; Petition at 19a. After reviewing its earlier decision in light of Walton, the Court of Appeals reaffirmed that conclusion. Petition at 103a, 106a.

Godfrey and Maynard stand for the basic proposition, first announced in Gregg v. Georgia, 428 U.S. 153 (1976), that the use of a vague, imprecise aggravating circumstance fails to channel a sentencer's discretion in a meaningful way and thus results in arbitrary and capricious application of the death penalty, in violation of the Eighth Amendment. See Stringer v. Black, 60 U.S.L.W. 4214, 4216 (March 9, 1992). Maynard implies, and Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. 313, (1990) holds, that an appellate construction intended to limit a facially vague aggravating circumstance must in fact narrow and give content to the vague statute. Walton affirms all of these rules, but presumes that sentencing judges are aware of a limiting construction previously adopted by a state appellate court.

When Furman v. Georgia, 408 U.S. 238 (1972), found the death penalty was unconstitutional as then administered, it was because "Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die." Id. at 248 (Douglas, J., concurring) (emphasis added). See similar references id. at 253, 255 (Douglas, J.); 391 (White, J.) 400 (Burger, CJ., dissenting). Throughout the several opinions, it is clear that both jury and judicial discretion was deemed unconstitutionally "untrammeled."

No case decided by this or any other court holds that a constitutionally defective aggravating circumstance which has not been narrowed by construction in a manner consistent with the Constitution may survive Eighth Amendment analysis merely because the capital sentencing is performed by a judge or judges. Yet, that appears to be petitioner's claim. That claim should be rejected and the petition denied.

IV. THE COURT OF APPEALS DID NOT APPLY ANY IMPROPER STANDARD IN DETERMINING VAGUENESS

Petitioner's complaint that the Court of Appeals improperly struck the aggravating circumstance because of the "subjective" nature of the construction adopted by the Nebraska Supreme Court mischaracterizes the actual decision of the Court of Appeals.

It is true that both the District Court and the Court of Appeals held that a state must "channel the Sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death." 904 F.2d at 1232, n. 7. In so doing, however, the Court of Appeals was merely applying the law announced by this Court in Gregg v. Georgia, 428 U.S. 153, 198 (1976), and reaffirmed in Godfrey v. Georgia, 446 U.S. 420, 428 (1980); and Lewis v. Jeffers, ___ U.S. ___, 110 S.Ct. 3092, 3099 (1990). See also Mills v.

Maryland, 486 U.S. 367, 374 (1988) (Sentencer's discretion "must be guided appropriately by objective standards").

The Nebraska Supreme Court has likewise recognized its obligation to apply the standard established in Gregg. See State v. Simants, 197 Neb. 549, 563, 250 N.W.2d 881, 890 (1977); State v. Palmer, 224 Neb. 282, 320, 399 N.W.2d 706, 732 (1986) (adopting new definition for depravity "prong," and noting that "both the phrase 'especially heinous, atrocious, cruel' and the phrase 'manifested exceptional depravity by ordinary standards of morality and intelligence' provide objective standards in imposing the death penalty. . . .").

The Court of Appeals can hardly be faulted for following a legal standard consistently adhered to by this Court. Moreover, the Court of Appeals simply did not hold "that an appropriately defined aggravating circumstance cannot be based upon the sentencing entity's determination of subjective factors such as the killer's state of mind," as the petition misleadingly suggests. Petition at 13.

As noted by the Court of Appeals, "the sole issue raised by the State in this appeal is whether the phrase 'manifested exceptional depravity by ordinary standards of morality and intelligence,' contained in section 29-2523(1)(d), is unconstitutionally vague as written and construed by the Supreme Court of Nebraska." 904 F.2d at 1228. Contrary to Petitioner's claim, the Court of Appeals understood its "task" to be:

> to determine whether the Supreme Court of Nebraska has construed the "exceptional depravity" language in a manner which directs and limits the discretion of the sentencing body "so as to minimize the risk of wholly arbitrary and capricious action," [Gregg] at 189, 96 S.Ct. at 2932, and provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." id. at 188, 96 S.Ct. at 2932 (quoting Furman, 408 U.S. at 313, 92 S.Ct. at 2764 (White, J., concurring)).

904 F.2d at 1229. Indeed, the Court of Appeals expressly disclaimed any intent to decide the claim Petitioner accuses it of deciding wrongly. See 904 F.2d at 1232, n. 7 ("We believe that this is an issue which we need not explore"). In considering the Petitioner's rehearing request in light of Walton and Jeffers, the Court of Appeals adhered to its earlier analysis and decision. Petition at 104a.

The constitutional defect inherent in the construction of this aggravator at the time Respondent was sentenced is not that it focused on the defendant's state of mind; rather, the defect is that the aggravator was not focused at all. The "construction" was every bit as vague and imprecise as the statutory language itself. See Shell v. Mississippi, 498 U.S. at __, 111 S.Ct. at 313. The issue resolved by the Court of Appeals, while important to the parties, is one this Court has reviewed a half-dozen times over the last 16 years. The Court need not revisit it.

V. THE COURT OF APPEALS' DISCUSSION OF STATE V. PALMER WAS INVITED BY THE ARGUMENT MADE BY PETITIONER

The final complaint Petitioner advances against the Circuit Court's decision relates to the Court's consideration of the construction of the "exceptional depravity" aggravating circumstance adopted in State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Such consideration was invited by the Petitioner. The Petitioner's brief in the Circuit Court argued that the Palmer construction was constitutionally sufficient and controlled resolution of this case, despite the fact that the Palmer construction was not adopted until more than six years after Respondent's sentence was imposed. See 904 F.2d at 1231. This "troubling" argument led the Circuit Court to consider the Palmer decision. Compare, Stringer v. Black, 60 U.S.L.W. 4214, 4218 (1992) ("It is a fiction for the State to contend that in 1984 its courts relied on a 1988 decision"). That con-

sideration merely reinforced the Court's decision that the construction of the aggravator in existence at the time Respondent was sentenced was insufficiently precise. Id.

In its brief on rehearing, the State revamped its approach to Palmer. Instead of arguing merely that Palmer cures all vagueness problems, the Petitioner took the position that Palmer's oblique reference to Respondent's case amounted to a reweighing under Clemons v. Mississippi, 494 U.S. 738 (1990). The Circuit Court implicitly rejected this cynical claim, and again reaffirmed its previous conclusion that Palmer's abandonment of the construction under which the "exceptional depravity" aggravator was found to apply to Respondent's case buttressed the conclusion that such original construction was unconstitutionally vague. See Petition at 104a. The Circuit Court did, however, note that "any remand will require consideration of Clemons. . . ." Petition at 105a.

The Circuit Court's response to Petitioner's Palmer-based argument is correct and, given Petitioner's position before the Circuit Court, unavoidable. That Petitioner is dissatisfied with the resolution of an issue he injected into the case provides no basis for granting a writ of certiorari.

CONCLUSION

The petitioner has offered no good reason for this Court to review the decision of the Court of Appeals. The Petition for Writ of Certiorari should be denied.

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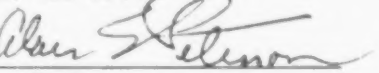
By: 

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